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Indenture Trustee*

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re:

PG&E CORPORATION,

- and -

**PACIFIC GAS AND ELECTRIC
COMPANY,**

Debtors.

☐ Affects PG&E Corporation
☐ Affects Pacific Gas and Electric
Company
☒ Affects both Debtors
* *All papers shall be filed in the Lead
Case, No. 19-30088 (DM).*

Case No. 19-30088 (DM)

Chapter 11

(Lead Case)

(Jointly Administered)

**OBJECTION OF BOKF, NA AS
INDENTURE TRUSTEE TO DEBTORS'
MOTION PURSUANT TO 11 U.S.C. §§ 363(b)
AND 105(a) AND FED. R. BANKR. P. 6004
AND 9019 FOR ENTRY OF AN ORDER (I)
AUTHORIZING THE DEBTORS AND TCC
TO ENTER INTO RESTRUCTURING
SUPPORT AGREEMENT WITH THE TCC,
CONSENTING FIRE CLAIMANT
PROFESSIONALS, AND SHAREHOLDER
PROPONENTS, AND (II) GRANTING
RELATED RELIEF.**

Hearing

Date: December 17, 2019

Time: 2:00 p.m. (Pacific time)

Place: Courtroom 17

450 Golden Gate Ave, 16th Floor
San Francisco, CA 94102

Objection Deadline: December 16, 2019

12:00 p.m. (Pacific Time)

BOKF, NA (“BOKF”), in its capacity as successor indenture trustee (the “Trustee”) under the Indentures dated as of (i) April 22, 2005 Supplementing, Amending and Restating the Indenture of Mortgage Dated March 11, 2004 (ii) November 29, 2017 and (iii) August 6, 2018, each as supplemented or amended, pursuant to which Pacific Gas and Electric Company issued the senior notes (the “Senior Notes”), by and through its counsel, Arent Fox LLP, hereby objects the Debtors’ Motion Pursuant to 11 U.S.C. §§ 363(b) and 105(a) and Fed. R. Bankr. P. 6004 and 9019 for Entry of an Order (I) Authorizing the Debtors and TCC to Enter Into Restructuring Support Agreement with the TCC, Consenting Fire Claimant Professionals, and Shareholder Proponents, and (II) Granting Related Relief [Docket No. 5038] (the “Motion”).¹ In support of its objection, BOKF states as follows:

PRELIMINARY STATEMENT

The Governor’s letter to the Debtors’ CEO dated December 13, 2019, (the “Governor Letter”) articulates extensive concerns and the reasons why in his judgement, the Debtors’ Amended Plan does not comply with AB 1054. Given the sheer nature of these issues and the fact that the Governor advised the Debtors of them in advance of entry into the Tort Claimants RSA (the “TCC RSA”), it does not appear they will or could be resolved prior the hearing on the Motion (or even in the near future), resulting in an automatic termination event under Section 3(a)(iii) of the TCC RSA. This reason alone warrants denial of the TCC RSA.

Further, contrary to the Debtors’ contention in their Motion that “no real obstacles remain,” the process is not over. The Amended Plan faces numerous obstacles to confirmation, some of which arise from the Debtors’ own insistence on pursuing a strategy that enriches equity

¹ Capitalized terms used, but not defined, herein shall have the meanings ascribed to them in the Motion.

1 holders at the expense of creditors and, ultimately, the Debtors' long-term viability. In fact, the
2 Amended Plan still appears to be inferior to the Alternative Plan. The dual-plan process and
3 mediation must continue in order to foster further negotiations and a global resolution, while
4 providing the Court with the ability to confirm the *best* plan available as opposed to the *only* plan
5 left when it is too late to change course. The TCC RSA should be consistent with these goals and
6 should not attempt to lock up votes against the Alternative Plan or preclude the TCC or other
7 Parties to the TCC RSA from negotiating to reach a global resolution of these chapter 11 cases.

8 **OBJECTION**

9 **A. The TCC RSA Undermines and Runs Afoul of, the Dual-Plan and Related 10 Processes Implemented by this Court**

11 The TCC RSA requires the signatory Parties to vote against any alternative plan and
12 restricts the Parties, including the TCC and the Shareholder Proponents, from participating in the
13 formulation of any kind of alternative plan structure, including with the TCC's original co-plan
14 proponent. TCC RSA, § 2(n)-(o). The Court terminated exclusivity and ordered mediation in
15 order to foster negotiation and consensus-building through a dual-plan process. That process
16 appears to be working. It must continue with more urgency and not end amid considerable
17 uncertainty. Under the time constraints imposed by AB 1054, there is no more room for error.
18 A global resolution cannot occur if the Parties to the TCC RSA cannot engage with the other
19 creditor constituencies, including the TCC's former co-plan proponent, to formulate an
20 alternative path, whether or not such alternative is a modified Amended Plan or some variation
21 of the Alternative Plan.

22 Fixing the value of the Fire Victim Trust and avoiding the uncertainty of estimation is a
23 positive development. The settlement itself is a benefit. But the Debtors are severely restricting
24 the mechanisms for achieving both a global resolution and a confirmable plan that will satisfy
25 AB 1054, leave the Debtors adequately capitalized, and enable a viable and safer reorganized
26 entity moving forward. This is not only senseless, it is harmful. Indeed, the Governor has
27 already highlighted many of the reasons why the Amended Plan is deficient and requires
28 substantial revisions. Having a competing plan process is likely to facilitate fixes and
improvements to the Amended Plan and could lead to a global resolution. However, if the

1 Debtors continue to ignore the Governor and avoid the proper treatment of unsecured creditors,
2 including the holders of Senior Notes, their actions should not be allowed to hold up moving
3 forward with the Alternative Plan.

4 The Amended Plan may or may not be the better plan if the Alternative Plan can honor
5 the same obligations and among other things, result in more appropriately capitalized entity with
6 access to the capital it needs to achieve the goals of AB 1054. In the event both the Amended
7 Plan and the Alternative Plan meet the requirements for confirmation, the “court shall consider
8 the preferences of creditors and equity security holders in determining which plan to confirm.”
9 11 U.S.C. § 1129(c). Thus, it is the Court who is the ultimate gatekeeper. Allowing the Debtors
10 to consummate the TCC RSA (as well as the Subrogation RSA) as presently structured would
11 undermine the dual-plan process and the Bankruptcy Code’s mechanisms for considering
12 multiples plans because the RSA’s require the Parties not only to oppose the Alternative Plan,
13 but also to refrain from participating in negotiations with the Ad Hoc Noteholder Committee.
14 Thus, the anti-competitive restrictions in both the TCC and Subrogation RSA are fundamentally
15 inconsistent with this Court’s expressed desire to achieve one consensual plan, have two plans
16 with one as a back-up or to utilize an 1129(c) determination. The estates as a whole can still
17 benefit from the two settlements and move towards emergence if the Fire Victims and the
18 Subrogation Claim amounts are fixed but not tied *only* to the Debtors’ Amended Plan and
19 inapplicable under the Alternative Plan.

20 Notably, the TCC previously opposed a lock-up provision in the pending RSA with
21 Subrogation Claimants (“Subrogation RSA”) [Doc. No. 4232, p. 5]. BOKF objects to the TCC
22 RSA for the same reason the TCC objected to the Subrogation RSA: because lock-up restrictions
23 of this nature are not in best interests of the estate or creditors as a whole. *See In re Braniff*
24 *Airways, Inc.*, 700 F.2d 935, 939-940 (5th Cir. 1983) (plan support agreement that dictated votes
25 and terms of plan not authorized by § 363(b)). The Debtors can lock up support for their own
26 plan, but they should not be permitted to undermine the Court’s Order terminating exclusivity or
27 the operation of § 1129(c) by precluding parties from negotiating with the other constituencies
28 about alternative restructurings. *See also In re TCI 2 Holdings LLC*, 428 B.R. 117, 137 (Bankr.

1 N.J. 2010) (debtor may not use settlement to perform end-run around Bankruptcy Code). Such
2 anti-competitive provisions are not in the best interest of creditors or the estate given the unique
3 circumstances present here. *See In re MGS Marketing*, 111 B.R. 264, 267 (B.A.P. 9th Cir. 1990)
4 (compromises under Rule 9019 must be in the best interest of the estate and fair and equitable to
5 creditors). *See also In re 240 North Brand Partners, Ltd.*, 200 B.R. 653, 659 (B.A.P. 9th Cir.
6 1996) (“requirements of section 363(b) protect the creditors' interest in the assets of the estate”).

7
8 **B. The Debtors’ Plan Is Fraught with Uncertainty, Legal Hurdles and Execution Risk**

9 The termination of exclusivity led to the Alternative Plan and a mediation process that
10 substantially increased the Debtors’ value proposition to wildfire victims.² That was not,
11 however, the “last obstacle” to confirmation of the Debtors’ Amended Plan. Obviously the
12 Amended Plan has yet to be approved by the CPUC and the Governor has already declared that it
13 fails to meet the requirements of AB 1054. The Debtors do not yet have the support of the
14 Unsecured Creditors’ Committee or the Ad Hoc Noteholder Committee. Moreover, the TCC
15 RSA intensifies existing concerns about the Debtors’ liquidity. The Governor points out that the
16 significant issues with the reorganized debtor’s capital structure arise in part from the Debtors’
17 use of a “combination of holdco debt, secured debt, securitization and monetization of net
18 operating losses in order to make plan distributions leaving the reorganized entity with limited
19 tools to finance itself when it needs access to capital to make billions of dollars in safety
20 investments.” Governor Letter at 4. There are no disclosures or analyses about “Tax Benefits
21 Payment Agreement” that will fund \$1.35 billion in payments. The Governor also raises a valid
22 concern about the Debtors’ reliance on “expensive and short-term bridge financing.” *Id.* The
23 Debtors have not disclosed whether their auditors will raise a going concern issue if more than
24 \$34 billion in debt will need to be refinanced within a year of exiting chapter 11. If the goal is to
25 emerge financially stronger in order protect the public from future harm, fix the errors of the
26
27

28 ² Value to the Fire Victims and Subrogation Claimants combined increased by \$7.6 billion, or 42%, as a result of the dual-track competitive process.

1 past, timely pay Fire Victims, and leave unsecured creditors as though there was no filing, some
2 of the Debtors' decisions are questionable.

3 The Debtors have elected to litigate for the benefit of equity holders, the enforceability of
4 their contractual obligations to pay (i) contract rate interest post-petition and (ii) optional
5 redemption premiums in light of the Debtors' own decision to refinance rather than reinstate the
6 Senior Notes. This litigation has created more uncertainty and risk around the viability of the
7 Amended Plan and continues to polarize key stakeholders. Rather than trying to build consensus
8 around these two creditor disputes, the Debtors are pursuing an all or nothing litigation strategy
9 that benefits equity. Not only does this strategy put the entire case at risk, it is inconsistent with
10 the Debtors' repeatedly stated goals in these cases: to address wildfire liability and leave other
11 unsecured creditors unaffected. The Debtors have gone so far as to question why they should
12 even negotiate with creditors who the Debtors allege are being paid in full. If that were the case,
13 the Debtors should honor their contractual obligations and pay post-petition interest at the
14 contract rate and either reinstate the Senior Notes or pay the optional redemption premiums due
15 in the event they elect to refinance. The reality is that unsecured creditors have not been paid
16 during these cases (and under the Amended Plan will not be paid in accordance with their
17 contractual rights) and have faced costly litigation initiated by the Debtors on behalf of equity for
18 Debtors' refusal to honor their contractual obligations, despite their ability and story to do so. If
19 these cases are not about unsecured creditors, then the Debtors should stop litigating with them
20 and instead engage and make an effort to build consensus. The time to do so is now.

21 Perhaps the Debtors/equity perspective is that they might as well try to create a windfall
22 for equity or at least obtain leverage in negotiations. The estates though, pay a high price for a
23 strategy that increases uncertainty and puts confirmation at risk. Even if the Debtors prevail on
24 one or both issues before this Court, unsecured creditors will appeal and litigation will continue.
25 The Debtors will then need to set aside a reserve with sufficient funds in order to confirm their
26 Amended Plan by June 30, 2020. It is far from clear that the Debtors will have more than \$500
27 million to reserve for payments at the contractual interest rate or more than \$5 billion to reserve
28 to pay optional redemption premiums. If the creditors prevail (or frankly even if the Debtors'

temporarily prevail and appeals are pending at confirmation), the Debtors will likely need to reinstate some or all of the Senior Notes or will need additional funding.³ Given that it is more likely than not that this Court or an appellate court will rule in favor of unsecured creditors, including the noteholders (particularly in light of the Debtors' proclamation that the Debtors are solvent and these cases are not about unsecured creditors), the Debtors should end the litigation, eliminate the related financing risks and contingencies, and fix the Amended Plan to address these issues.

CONCLUSION

In the event the Debtors' gambit fails or simply presents a less attractive bargain, the Court and all stakeholders should have the opportunity to go with or to select an alternative plan. There is no reason or rational basis why the Alternative Plan should not be able to offer Fire Victims and the Subrogation Claimants the same or better treatment that is afforded under the Debtors' Amended Plan.

Based on the foregoing, the TCC RSA in its current form should not be approved at this time. Assuming the TCC RSA has not been terminated by its own terms or that the Court nonetheless considers its approval, the Court should only approve the TCC RSA if it is modified to be consistent with the goals and processes created by this Court.

Dated: December 16, 2019

ARENT FOX LLP

By: /s/ Aram Ordubegian

Aram Ordubegian (SBN 185142)

Andrew I. Silfen (*pro hac vice*)

Beth M. Brownstein (*pro hac vice*)

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³ The Debtors have pushed a narrative that they will easily be able to refinance the Senior Notes at lower interest rates that will result in lower yearly interest expense. If that were true, it is unclear why the Debtors would need the approximately \$34 billion in 364-day bridge financing and to incur the administrative fees associated with it. After, calculating those fees, it is not clear that refinancing is even preferable to reinstatement. In fact, it is quite possible that the costs and risks of the bridge loan may be more expensive than reinstatement.